

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF PUERTO RICO

ROBERTO REINO SOTORRIO,

Plaintiff,

V.

CIVIL NO. 04-2202 (RLA)

EL HIPOPOTAMO, INC., et al.,

Defendants.

ORDER IN THE MATTER OF DEFENDANTS' MOTION TO DISMISS

10 Defendants have moved the Court to dismiss this action alleging  
11 failure to state a claim as well as lack of a cognizable cause of  
12 action against the individually named defendant. The Court having  
13 reviewed the arguments presented as well as the amended complaint  
14 filed in the instant proceedings hereby rules as follows.

## Background

16                   This action was instituted by ROBERTO REINO-SOTORRIO against EL  
17 HIPOPOTAMO, INC. and FRANCISCO ALMEYDA DE LEON claiming age  
18 discrimination under the provisions of the Age Discrimination in  
19 Employment Act ("ADEA"), 29 U.S.C. §§ 621-634.

20        Additionally, plaintiff has asserted claims under our  
21 supplemental jurisdiction pursuant to two Puerto Rico labor statutes,  
22 i.e., Law No. 100 of June 30, 1959, 29 P.R. Laws Ann. § 146 (2002)  
23 as well as Law No. 80 of May 30, 1976, P.R. Laws Ann. Tit. 29, § 185a  
24 *et seq.*

25 Defendants argue that the facts asserted in the amended pleading  
26 are insufficient to adequately plead an ADEA cause of action.

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2  
3 **Rule 12(b) (6)**  
4

In disposing of motions to dismiss pursuant to Rule 12(b) (6) Fed. R. Civ. P. the court will accept all factual allegations as true and will make all reasonable inferences in plaintiff's favor. Frazier v. Fairhaven School Com., 276 F.3d 52, 56 (1<sup>st</sup> Cir. 2002); Alternative Energy, Inc. v. St. Paul Fire and Marine Ins. Co., 267 F.3d 30, 33 (1<sup>st</sup> Cir. 2001); Berezin v. Regency Sav. Bank, 234 F.3d 68, 70 (1<sup>st</sup> Cir. 2000); Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 92 (1<sup>st</sup> Cir. 2000).

Our scope of review under this provision is a narrow one. Dismissal will only be granted if after having taken all well-pleaded allegations in the complaint as true, the court finds that plaintiff is not entitled to relief under any theory. Brown v. Hot, Sexy and Safer Prods., Inc., 68 F.3d 525, 530 (1st Cir. 1995) cert. denied 116 S.Ct. 1044 (1996); Vartanian v. Monsanto Co., 14 F.3d 697, 700 (1st Cir. 1994). Further, our role is to examine the complaint to determine whether plaintiff has adduced sufficient facts to state a cognizable cause of action. Alternative Energy, 267 F.3d at 36. The complaint will be dismissed if the court finds that under the facts as pleaded plaintiff may not prevail on any possible theory. Berezin, 234 F.3d at 70; Tompkins, 203 F.3d at 93.

24  
25 **ADEA**  
26

The ADEA makes it "unlawful for an employer... to discharge any individual or otherwise discriminate against any individual...

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2 because of such individual's age." 29 U.S.C. § 623(a)(1). Under the  
3 ADEA, an employer is liable if age was the motivating factor in the  
4 employer's decision. "That is, the plaintiff's age must have  
5 'actually played a role in [the employer's decision making] process  
6 and had a determinative influence on the outcome'." Reeves v.  
7 Sanderson Plumbing Prods., Inc., 530 U.S. 133, 141; 120 S.Ct. 2097;  
8 147 L.Ed.2d 105 (2000) (citing Hazen Paper Co. v. Biggins, 507 U.S.  
9 604, 610; 113 S.Ct. 1701; 123 L.Ed.2d 338 (1993)). Thus, in this  
10 case, plaintiff has the burden of establishing that defendant  
11 intentionally discriminated against him based on his age. See,  
12 Shorette v. Rite Aid of Maine, Inc., 155 F.3d 8, 12 (1<sup>st</sup> Cir. 1998).

13 Where, as here, there is no direct evidence of discrimination,  
14 the plaintiff may prove his case through the burden-shifting  
15 framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S.  
16 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Rivera Rodriguez v. Frito  
17 Lay Snacks Caribbean, 265 F.3d 15, 25 (1<sup>st</sup> Cir. 2001); Suarez v.  
18 Pueblo Int'l, Inc., 229 F.3d 49, 53 (2000); Feliciano v. El  
19 Conquistador, 218 F.3d 1, 5 (1<sup>st</sup> Cir. 2000). Under this framework,  
20 the plaintiff must prove that: (1) he was over forty (40) years of  
21 age; (2) his job performance was sufficient to meet his employer's  
22 legitimate job expectations; (3) he experienced an adverse employment  
23 action; and (4) the employer continued to need the services of the  
24 position claimant occupied. See, De La Vega v. San Juan Star, Inc.,  
25 377 F.3d 111, 117 (1<sup>st</sup> Cir. 2004); Gonzalez v. El Dia, Inc., 304 F.3d  
26

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2 63, 68 n.5 (1<sup>st</sup> Cir. 2002); Udo v. Tomes, 54 F.3d 9, 12 (1<sup>st</sup> Cir.  
3 1995); Goldman v. First Nat'l Bank of Boston, 985 F.2d 1113, 1117 (1<sup>st</sup>  
4 Cir. 1993).

5 We find that plaintiff has satisfied these minimum requirements  
6 to adequately plead an ADEA claim in his filings with the court.  
7 There are sufficient facts asserted in the pleadings to put the  
8 defendant on notice of the claims asserted against them. Plaintiff  
9 has specifically stated that: he is 75 years old and thus protected  
10 by the provisions of the ADEA; his previous work was satisfactory and  
11 after acquiring the restaurant - where plaintiff had been employed  
12 for approximately 18 years - MR. ALMEYDA DE LEON engaged in specific  
13 age-based discriminatory conduct to force him to resign and  
14 eventually substitute him for a younger individual.  
15

16 Accordingly, defendants' request to dismiss the ADEA claim is  
17 **DENIED**.

18 However, we find that the ADEA does not allow for individual  
19 liability of an employer's agents or supervisors. Rivera Sanchez v.  
20 Autoridad de Energia Electrica, 360 F. Supp.2d 302, 317 (D.P.R.  
21 2005); Orell v. U. Mass. Mem'l Med. Ctr., Inc., 203 F. Supp.2d 52, 64  
22 (D.Mass. 2002); Diaz v. Antilles Conversion & Export, Inc., 62 F.  
23 Supp.2d 463, 465 (D.P.R. 1999); Vicenty Martell v. Estado Libre  
24 Asociado de P.R., 48 F. Supp.2d 81, 87 (D.P.R. 1999).

25 Accordingly, the ADEA claims asserted against FRANCISCO ALMEYDA  
26 DE LEON in his individual capacity are hereby **DISMISSED**.

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3 **Supplemental Claims**  
45 Additionally, defendants have moved the court not to entertain  
6 the claims asserted under the Puerto Rico statutory provisions and to  
7 dismiss the allegations based on state law against MR. ALMEYDA DE  
8 LEON in his individual capacity.  
910 Law 100 is the local equivalent of ADEA providing for civil  
11 liability, *inter alios*, for age discrimination in employment.<sup>1</sup> De La  
12 Vega v. San Juan Star, Inc., 377 F.3d 111, 119 (1<sup>st</sup> Cir. 2004);  
13 Alvarez-Fonseca v. Pepsi Cola de Puerto Rico Bottling Co., 152 F.3d  
14 17, 27 (1<sup>st</sup> Cir. 1998); Varela Teron v. Banco Santander de Puerto  
15 Rico, 257 F. Supp.2d 454, 462 (D.P.R. 2003). The Puerto Rico Supreme  
16 Court has unequivocally ruled that individual liability as to MR.  
17 ALMEYDA DE LEON is allowed under Law 100. Rosario-Toledo v.  
18 Distribuidora Kikuet, Inc., 151 D.P.R. 634 (2000).  
1920 Accordingly, the request to dismiss the Law 100 cause of action  
21 against MR. ALMEYDA DE LEON in his personal capacity is **DENIED**.  
2223 Plaintiff also petitions relief under Law 80 also known as Puerto  
24 Rico Wrongful Discharge Act, which seeks to protect individuals in  
25 their employment by requiring employers to indemnify them if  
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28<sup>1</sup> In pertinent part, the statute provides:29 Any employer who... fails or refuses to hire or  
30 rehire a person... on the basis of... age...  
31 shall incur civil liability....  
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2 discharged "without just cause". P.R. Laws Ann. tit. 29, § 185a  
3 (Supp. 1998).

4 The Court, in the exercise of its discretion, shall retain  
5 supplemental jurisdiction over the pendent Law 80 and Law 100 state  
6 law claims pursuant to 28 U.S.C. § 1337. See, Vera-Lozano v. Int'l  
7 Broadcasting, 50 F.3d 67, 70 (1<sup>st</sup> Cir. 1995). Accordingly, defendants'  
8 request to dismiss the local causes of action is **DENIED**.

9 **Conclusion**

10 Based on the foregoing, defendants' Motion to Dismiss (docket  
11 No. 9)<sup>2</sup> is disposed of as follows:

12 - The request to dismiss the ADEA claim is **DENIED**.

13 - The ADEA claims asserted against FRANCISCO ALMEYDA DE LEON  
14 in his individual capacity are hereby **DISMISSED**.

15 - The request to dismiss the Law 100 cause of action against  
16 MR. ALMEYDA DE LEON in his personal capacity is **DENIED**.

17 - The request to dismiss the local causes of action is  
18 **DENIED**.

19 IT IS SO ORDERED.

20 San Juan, Puerto Rico, this 7<sup>th</sup> day of September, 2005.

22 \_\_\_\_\_  
23 S/Raymond L. Acosta  
24 RAYMOND L. ACOSTA  
25 United States District Judge

26 \_\_\_\_\_  
27 <sup>2</sup> See, plaintiff's Opposition (docket No. 14).